only to lands or interests in lands; and * * * there is nothing in the act which authorizes the condemnation of a public works system such as this." 196 F. 2d at 662.

SPECIFICATIONS OF ERRORS TO BE URGED

The court of appeals erred:

1. In holding that Section 202 of the Act of June 28, 1941 (the Lanham Act, as amended) did not authorize the condemnation of easements in lands which contain sewer pipes being used for sewage disposal and deemed to be "already legally appropriated, to a public or quasi-public use."

2. In failing to hold that the requirements of the Act of July 15, 1943, 57 Stat. 565, for acquisition of public works were satisfied in this case.

3. In affirming the judgment of the district court.

SUMMARY OF ARGUMENT

I

Section 202 of the Lanham Act, 55 Stat. 362, 42 U.S.C. 1532, *supra*, p. 3, authorizing the condemnation of "improved or unimproved lands or interests in lands" plainly authorizes, by its literal terms, the condemnation of easements in lands that contain sewer pipes used for sewage disposal. The holding of the court of appeals that statutory authority to condemn property already devoted to a public or quasi-public use must be expressly given

or necessarily implied" overlooks the distinction drawn in *United States* v. *Carmack*, 329 U.S. 230, between statutes delegating the power of eminent domain to utility corporations and Acts of Congress authorizing government agencies to condemn. The latter have invariably designated the property to be acquired in general terms and have always been interpreted to authorize the condemnation of property devoted to public use. This rule of interpretation was applied by this Court in the *Carmack* case.

The court of appeals erroneously stated that the decision in *Puerto Rico Ry. Light & Power Co.* v. *United States*, 131 F. 2d 491 (C.A. 1), and the enactment of the Act of July 15, 1943, 57 Stat. 565, *supra*, pp. 3-4, show that the Lanham Act did not authorize the acquisition of existing public works. Rather, the *Puerto Rico* case expressly recognized that the Act applied to lands or interests in lands used in connection with public works. The 1943 proceedings in the Senate, upon which the court below relied, also evince this construction of the Lanham Act.

II

The court of appeals was mistaken in its opinion that the district court rightly dismissed the condemnation proceeding because of non-compliance with the provision of the amendatory Act of July 15, 1943, conditioning acquisition of existing public works upon "the consent of the owners."

The answer of the corporate owner made no objection to maintenance of the proceeding and asked just compensation for the property. Statements in the answer, which the court below thought indicated that the owner had given its consent upon a condition the Government would not accept, merely show an unsuccessful attempt to agree upon the form and amount of compensation and not the imposition of a condition precedent to the taking itself. The further view of both lower courts that the users of the system were also "owners" within the meaning of the provision is erroneous. That construction would prevent the legal owner from disposing of public works even if it desired to do so, and, because of the virtual impossibility of obtaining unanimous consent of users of such works, would convert the provision into one prohibiting, rather than merely limiting, their acquisition. Moreover, the lot owners who used the sewer system were not its "owners" in any accepted or conventional sense.

III

Since there has been no trial, but merely a determination of certain issues of law on the pleadings, this Court should not consider contentions of respondents dependent upon factual determinations, such as whether the taking was for a federal purpose, whether the taking was necessary, whether funds were allotted for substantial improvements as required by the amendatory Act of

July 15, 1943, and whether the President's letter of authorization satisfied the requirements of Section 202 of the Lanham Act as to findings of a shortage of existing facilities.

ARGUMENT

I

An Act of Congress Authorizing Acquisition of "Improved or Unimproved Lands or Interests in Lands" Authorizes Condemnation of Easements in Lands Which Contain Sewer Pipes Being Used for Sewage Disposal

1. Section 202 of the Lanham Act, as amended (p. 3, *supra*), authorizes the condemnation of "improved or unimproved lands or interests in lands" for "public works". The interests here taken are easements on lands containing underground sewer pipes, as well as title to the sewer mains. *Supra*, p. 4. Obviously, the easements are "interests" in "improved lands" (*United States* v. *Welch*, 217 U.S. 333, 339; *United States* v. *Dickinson*, 331 U.S. 745, 748, 751), and hence within the literal terms of Section 202. The sewer pipes, imbedded and fixed in the ground, are part and parcel of the "improved land" and as such also fall squarely within the statutory words. See *United States* v. *Sunset Cemetery Co.*, 132 F. 2d 163, 164-5 (C.A. 7); *Danville Holding Corp.* v. *Clement*, 178 Va. 223, 232-233; 1 Thompson, *Real Property* (Perm. ed. 1939), Sec. 177; 2 Tiffany, *Real Property* (3rd ed. 1939), Sec. 606. Both the easements and the mains were taken as part of a

larger sewer system to be constructed for defense housing in Fairfax County, *i.e.*, "public works necessary to the health, safety, or welfare of persons engaged in national-defense activities" (as the statute prescribes). There is, therefore, no doubt that the literal words Congress wrote into Section 202 authorize the present condemnation.

2. The court of appeals held, however, that the section, despite its terms, did not authorize the condemnation because it "is well settled that a general power of condemnation does not authorize the condemnation of property already legally appropriated to a public or quasi-public use, in the absence of legislative authority expressly given or necessarily implied" (R. 47). Thus, as respondents conceded in their brief in opposition (p. 8), the lower court apparently overlooked the distinction drawn in *United States* v. *Carmack*, 329 U.S. 230, between statutes delegating the power of eminent domain to utility corporations (p. 243, fn. 13) and Acts of Congress authorizing government agencies to condemn (p. 242).[2] Unlike statutes dealing with utilities, Acts of Congress comparable to the Lanham Act have invariably designated the property to be acquired in general terms and have long been interpreted to authorize the condemnation by the

[2] All of the cases cited in the lower court's opinion (R. 47) deal with statutes delegating the power of eminent domain to utility corporations. The opinion does not mention or refer to the *Carmack* case.

Government of property devoted to public use for utility purposes or for streets, alleys, parks and the like. See e.g., *United States* v. *City of Tiffin*, 190 Fed. 279 (C.C.N.D. Ohio); *C. M. Patten & Co.* v. *United States*, 61 F. 2d 970, 971-973 (C.A. 9), decree vacated as moot, 289 U.S. 705; *United States* v. *Certain Parcels of Land*, 30 F. Supp. 372, 377 (D. Md.); *United States* v. *Parcel of Land*, 32 F. Supp. 718, 721 (D. Del.); *United States* v. *State of Montana*, 134 F. 2d 194, 196 (C.A. 9), certiorari denied, 319 U. S. 772. This was the view authoritatively adopted by this Court in 1946 in *United States* v. *Carmack*, 329 U.S. 230, 242.[3]

In the light of respondents' concession, it is unnecessary to deal at length with the *Carmack* case. There, this Court reversed the Court of Appeals for the Eighth Circuit for applying to other condemnation statutes of the United States the strict rule of construction invoked in this case by the court below. The United States had sued to condemn, as the site of a post office and custom house, land owned by a Missouri municipality and used by it for a park, courthouse, city hall, and public library. The acquiring officials relied on the general Condemnation Act of August 1, 1880, 40

---

[3] The contrary construction by the Fourth Circuit in *United States* v. *Southern Power Co.*, 31 F. 2d 852 (1929), was relied on by the Eighth Circuit in *Carmack* v. *United States*, 135 F. 2d 196, 199-201 (1943) and *United States* v. *Carmack*, 151 F. 2d 881 (1945), which were reversed by this Court in 329 U.S. 230.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
DEC 18 1952

No. 253

In the Supreme Court of the United States

OCTOBER TERM, 1952

UNITED STATES OF AMERICA, *Petitioner*

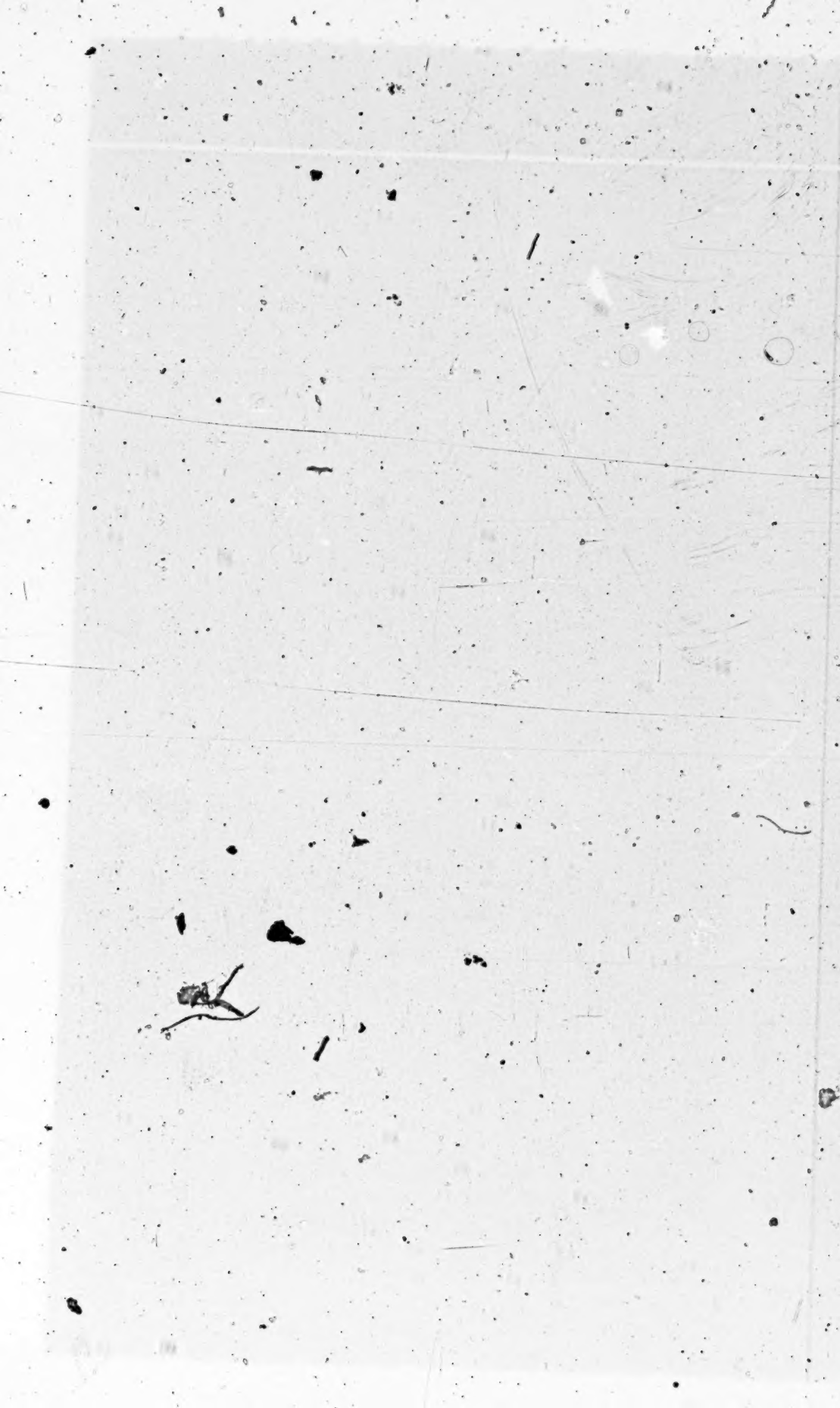
v.

CERTAIN PARCELS OF LAND IN THE COUNTY OF FAIRFAX, COMMONWEALTH OF VIRGINIA, AND BELLE HAVEN REALTY CORPORATION, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR THE UNITED STATES



INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	4
Specification of errors to be urged	8
Summary of argument	8
Argument:	
I. An Act of Congress authorizing acquisition of "improved or unimproved lands or interests in lands" authorizes condemnation of easements in lands which contain sewer pipes being used for sewage disposal	11
II. The provision of the Act of July 15, 1943, conditioning acquisition of existing public works upon consent of the owners, is complied with when the legal owner files an answer in condemnation making no objection to the proceeding	17
III. No other issues are properly before this Court	22
Conclusion	26

CITATIONS

CASES:

Carmack v. *United States*, 135 F. 2d 196, 151 F. 2d 881, reversed, 329 U.S. 230 ..... 13, 14
C. M. Patten & Co. v. *United States*, 61 F. 2d 970, decree vacated as moot, 289 U.S. 705 13
Danville Holding Corp. v. *Clement*, 178 Va. 223 11
Fogarty v. *United States*, 340 U.S. 8 17
Fountain v. *Filson*, 336 U.S. 681 24
Puerto Rico Ry. Light & Power Co. v. *United States*, 131 F. 2d 491 ..... 9, 14, 15-16, 17, 24, 25
United States v. *Carmack*, 329 U.S. 230 ..... 9, 12, 13
United States v. *Certain Parcels of Land*, 30 F. Supp. 372 13
United States v. *City of Tiffin*, 190 Fed. 279 13
United States v. *Dickinson*, 331 U.S. 745 11
United States v. *Parcel of Land*, 32 F. Supp. 718 13
United States v. *Southern Power Co.*, 31 F. 2d 852 13

Page

United States v. *State of Montana*, 134 F. 2d 194, certiorari denied, 319 U.S. 772 13
United States v. *Sunset Cemetery Co.*, 132 F. 2d 163 11
United States v. *Welch*, 217 U.S. 333 11

STATUTES:

General Condemnation Act of August 1, 1880, 40 U.S.C. 257 13
Public Buildings Act of May 25, 1926, 40 U.S.C. 341 14
Act of June 28, 1941, 55 Stat. 361, Sec. 202, 42 U.S.C. 1532, amending the Lanham Act of October 14, 1940, 54 Stat. 1125 ..... 2, 4, 7, 8, 11, 14, 16, 20, 24
Act of July 15, 1943, 57 Stat. 565 ..... 3, 7, 8, 9, 14, 16, 17, 20

MISCELLANEOUS:

A.L.I., *Restatement of Property*, vol. V, pp. 2897-8, 2905 22
89 Cong. Rec. 7286-7, 7314 ..... 16, 17
Thompson, *Real Property* (Perm. ed. 1939), vol. 1, Sec. 177 11
Tiffany, *Real Property* (3d ed. 1939), vol. 2, Sec. 606 11

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 253

UNITED STATES OF AMERICA, *Petitioner*

v.

CERTAIN PARCELS OF LAND IN THE COUNTY OF FAIRFAX, COMMONWEALTH OF VIRGINIA, AND BELLE HAVEN REALTY CORPORATION, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (R. 43-50) is reported at 196 F. 2d 657. The district court's opinion of November 4, 1948 (R. 18-20) is reported at 89 F. Supp. 571, its opinion of March 30, 1950 (R. 24-28) is reported at 89 F. Supp. 567, and its

opinion of December 3, 1951 (R. 36-41) at 101 F. Supp. 172.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1952 (R. 50). The petition for a writ of certiorari was filed on August 5, 1952, and was granted on October 13, 1952. The jurisdiction of this Court rests on 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether an Act of Congress authorizing the Federal Works Administrator, with the approval of the President, to condemn "improved or unimproved lands or interests in lands" authorizes the condemnation of easements in lands which contain sewer pipes being used for sewage disposal and deemed to be "already legally appropriated, to a public or quasi-public use."

2. Whether, under the Act of July 15, 1943, 57 Stat. 565, conditioning acquisition of public works upon "consent of the owners," a proceeding to condemn a sewerage system must be dismissed—although the legal owner does not object to its maintenance—because of the objections of householders served thereby.

STATUTES INVOLVED

So far as material, Section 202 of the Act of June 28, 1941, 55 Stat. 361, 362, 42 U.S.C. 1532,

amending the Lanham Act of October 14, 1940, 54 Stat. 1125, provides:

> SEC. 202. Whenever the President finds that in any area or locality an acute shortage of public works or equipment for public works necessary to the health, safety, or welfare of persons engaged in national-defense activities exists or impends which would impede national-defense activities, and that such public works or equipment cannot otherwise be provided when needed, or could not be provided without the imposition of an increased excessive tax burden or an unusual or excessive increase in the debt limit of the taxing or borrowing authority in which such shortage exists, the Federal Works Administrator is authorized, with the approval of the President, in order to relieve such shortage—
>
> (a) To acquire, * * * improved or unimproved lands or interests in lands by purchase, donation, exchange, lease * * * or condemnation * * * for such public works.

The Act of July 15, 1943, 57 Stat. 565, an appropriation act, provides:

> none of the funds authorized herein shall be used to acquire public works already operated by public or private agencies, except where funds are allotted for substantial additions or

improvements to such public works and with the consent of the owners thereof * * *.

STATEMENT

During World War II, the Federal Works Agency found it necessary to install a sewerage system for defense housing in Fairfax County, Virginia, and to utilize existing, privately-owned, easements containing sewer pipes as a part of the trunk line of that system. Accordingly, on December 13, 1944, the United States filed a petition in condemnation and a declaration of taking to acquire a permanent easement for the construction and operation of sewer pipes in land occupied by sewer pipes of the respondent Belle Haven Realty Corporation in the real-estate subdivision of Belle Haven. Estimated just compensation of $2.00 was deposited (R. 1-8). On April 8, 1948, by amendments to the petition (R. 9-10) and declaration of taking, the scope of the taking was enlarged to include easements in additional lands in the subdivision and also title to all sewer mains previously constructed by the Corporation in the area. An additional $1.00 was deposited. In consequence, the entire sewerage system of the Corporation, which moved the subdivision's sewage "by gravity" into the Potomac River (R. 35), was taken. This was done under authority of Section 202 of the Act of June 28, 1941, 55 Stat. 361, 42 U.S.C. 1532, amending the Lanham Act of October 14, 1940, 54 Stat. 1125 (*supra*, p. 3).

The United States connected the outlets of the existing system to the sewer system it had constructed. It leased the entire system to the Board of Supervisors of Fairfax County, effective in March, 1949, with permission to make reasonable charges for the services. Fairfax County apparently began to assess, in January, 1950, a monthly charge of $2 against the users of the system, including owners who had used the original Belle Haven system.

In August 1948, several owners in the Belle Haven subdivision applied to intervene in the condemnation proceedings as holders of implied easements in the original system. They alleged that they (and their predecessors) had paid *pro rata* for the installation of the Belle Haven sewer system as part of the purchase price of the individual lots in the subdivision, and that they thereby acquired easements with respect to the system and the right to use it free of charge. In their original applications, these intervenors asked that the court, in lieu of compensation for the taking, fix the reasonable charge of disposing of their sewage (R. 10-13). On November 4, 1948, the district court granted the petition to intervene, without passing on the intervenors' rights to an award of just compensation or to some arrangement in lieu of just compensation. R. 21-22; 89 F. Supp. 571. In February 1950, the intervenors filed an application to restrain collection of any charges until

the condemnation proceedings were concluded (R. 22-23). On the ground that it was powerless to limit the Government or the Government's lessee in their use or control of the sewer system, the district court, on March 30, 1950, denied the intervenors' application and granted the Government's motion to strike the demand in the intervenors' answer that the court should fix the reasonable charges of disposing of their sewage. The intervenors were granted permission to amend their answer. (R. 29-30; 89 F. Supp. 567.)

On April 28, 1950, the intervenors filed an amended answer denying the Government's authority to condemn, and asking restoration and return of the sewer system in its original condition (R. 30-32). On December 14, 1950, respondent Belle Haven Realty Corporation, which had not answered the condemnation petition to that time, finally did so (R. 33-34). It claimed as just compensation the present reproduction cost of the system less depreciation.[1]

---

[1] The Corporation's answer stated that out of discussions with Government representatives "there arose an agreement that this defendant [*i.e.*, the Belle Haven Realty Corporation] would accept nominal damages of $1.00 provided that the entire system in Belle Haven be taken including all laterals, and that in the final order it be provided that there be no maintenance, operation, construction, re-construction, replacements, or assessment charges against any lot, lots or parts of lots within the recorded subdivision of Belle Haven made and recorded prior to January 1, 1943; that there be no maintenance, operation, construction, re-construction, re-

On December 3, 1951, the district court entered judgment dismissing the condemnation proceeding. It held that the amendment of the Lanham Act of July 15, 1943, 57 Stat. 565, in providing that public works already operated by public or private agencies should not be acquired "except * * * with the consent of the owners thereof" (*supra*, pp. 3-4), required the consent not only of respondent Belle Haven Realty Corporation but also of those who were served by the sewerage system. It concluded that the Corporation had only conditionally consented and that those who used the system had not been consulted. 101 F. Supp. 172 (R. 36-41).

The court of appeals affirmed on the ground that Section 202 of the Act of June 28, 1941 (*supra*, p. 3), did not authorize this condemnation. 196 F. 2d 657; R. 43-50. And, while approving the trial court's construction of the 1943 amendment, it declined to consider this provision because (R. 49): "It is perfectly clear * * * that the power of condemnation given by the Lanham Act [*i.e.*, Section 202 of the Act of June 28, 1941] extends

---

placements, or assessment charges against any lots to be created abutting or being sewered into those sewers now built and existing in easements, dedicated streets, or proposed streets either in Belle Haven or New Alexandria as shown on plat prepared by Massey and Johnson January 16, 1943" (R. 34). The Corporation's answer also stated that its "agreement to accept nominal damages" was based on this agreement and that "it does not now believe that its understandings and proposed stipulations have been complied with" (R. 34).

pp. 2, 4-5, 9); (c) there is no showing that funds were allotted for substantial additions or improvements to the public works condemned, as required by the 1943 Act (*supra*, pp. 3-4) (see Br. in Opp., p. 2); and (d) that the requirements of Section 202 of the 1941 Act as to a Presidential finding (*supra*, p. 3) were not fulfilled (see Br. in Opp., pp. 9, 12). If the case is remanded and any of these subsidiary issues is deemed worthy of a trial, and properly a matter for judicial decision, the Government will make the required showing. To decide these issues now, adversely to the United States, on the basis of statements in the opinion of the court below, respondents' answers, and a short, uncalled-for affidavit (R. 34-35), is to deprive the United States of its right to a trial of such of these issues as may be triable. Cf. *Fountain* v. *Filson*, 336 U.S. 681.

2. Since the record does contain the President's letter of authorization (R. 36), we shall treat in greater detail the argument that Section 202 of the 1941 Act (*supra*, p. 3) required the President specifically to find, first, that there was an acute shortage of sewer facilities in the Belle Haven subdivision, and, second, to approve the particular means adopted by the Federal Works Administration to relieve the shortage, *i.e.*, the acquisition of the existing system (see Br. in Opp., pp. 2, 9, 12). Respondents rely on *Puerto Rico Ry. Light & Power Co.* v. *United States*, 131 F. 2d 491, 496 (C.A. 1), in which the court held that a letter

from the President, substantially like that involved here, did not show that he had approved the condemnation of utility properties "extending over thirty-five municipalities in the Island of Puerto Rico" and that "Congress never intended to commit to the Administrator the discretion to embark upon any such expensive program of condemnation as here presented, without specific approval by the President."

In this case, the President found that in various places in Fairfax County, Virginia, sewer facilities estimated to cost $936,000 for the entire project were required, and authorized the Federal Works Administrator to relieve the shortage by any of the methods prescribed by the Lanham Act (R. 36). The circumstances are obviously far different from those, involving a large island-wide utility system, which led the First Circuit, in the *Puerto Rico* case, to conclude that undue discretion had been exercised by the Administrator. And since the Belle Haven sewer system was but a small adjunct to the Fairfax County sewer project, it verges on the absurd to call for a Presidential decision as to whether this particular sewer system should be acquired as part of the County project and, if so, by what means. In passing the Lanham Act in October 1940, and amending it in June 1941, Congress plainly did not demand that degree of particularity from the President in a time of national emergency and war.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below is erroneous, and should be reversed.

WALTER J. CUMMINGS, JR.,
Solicitor General.

JAMES M. MCINERNEY,
ROWLAND F. KIRKS,
Assistant Attorneys General.

JOHN F. COTTER,
EDMUND B. CLARK,
Attorneys.

DECEMBER 1952

U. S. GOVERNMENT PRINTING OFFICE 1952—231196/P.O. 694

U.S.C. 257, authorizing the condemnation of "real estate" and the Public Buildings Act of May 25, 1926, 40 U.S.C. 341, authorizing condemnation of "sites and additions to sites." The court of appeals affirmed an order dismissing the proceeding on the ground that the statutes in question did not specifically authorize selection of property already devoted to public purposes. 151 F. 2d 881. This Court granted the Government's petition for certiorari, and reversed, saying (329 U.S. at p. 242): "We find in the broad terms of the Public Buildings Act authority for the designated officials to select the site they did. We find, in both Acts, authority for them to acquire by condemnation the site thus lawfully selected." The equally broad terms of Section 202 authorized the condemnation of the interests in land sought in the case at bar.

3. To support the erroneous holding below, both the court of appeals (R. 47) and respondents aver that the Court of Appeals for the First Circuit, in *Puerto Rico Ry. Light & Power Co.* v. *United States*, 131 F. 2d 491 (1942), decided that, despite the broad words used in Section 202, it was not the "intention of Congress" to authorize the acquisition of existing public works, and that Congress expressed the same view when thereafter it enacted the Act of July 15, 1943 (*supra*, pp. 3-4). This contention reflects a misunderstanding of the *Puerto Rico* decision and the circumstances of the enactment of the 1943 statute.

The *Puerto Rico* decision was that since Section 202 authorized the condemnation only of "improved or unimproved lands or interests in lands," the Government—which had attempted to take an entire Puerto Rican utility system—could not condemn those parts of the utility system which were *personalty*, because no general authority had been given to take either personal property or "public works" as a whole.[4] The appellate court directed dismissal of the entire proceeding because affirmance of the trial court's judgment as to the realty alone would irrevocably commit the United States to the payment of compensation "for something which the Federal Works Administrator might never have dreamed of taking had he correctly apprehended the limited scope of his powers under the act. Taking appellant's lands and easements would quite effectively dismember a going concern, but it is not obvious that this would contribute to the relief of a shortage in electrical transmission and distribution facilities." (p. 500). Thus, contrary to the view of the court of appeals in the present case, the *Puerto Rico* case does not hold that the Lanham Act fails to authorize the condemnation of lands devoted to existing public works. On the contrary, the First Circuit expressly de-

[4] The court found that "all the properties of appellant [the utility company], real and personal, have been taken over as a going concern", (p. 497). The personal property included machinery, rolling stock, implements, automative equipment, generators, telephone equipment, etc. (pp. 496-7, 499-500).

clared that the Act was applicable to such lands and interests in land, and clearly contemplated that lands and easements owned by a public utility could be taken. 131 F. 2d at 499, 500.

The congressional proceedings in respect of the Act of July 15, 1943 (amending the Lanham Act), upon which the court of appeals and respondents also rely, similarly fail to support the holding below. They show that the Senate first adopted an amendment providing that "none of the funds authorized herein shall be used to acquire public works already operated by public or private agencies" (89 Cong. Rec. 7286-7287), but that the following day the amendment was modified by the addition of the words "except where funds are allotted for substantial additions or improvements to such public works and with the consent of the owners thereof" (89 Cong. Rec. 7314). In this form the measure became law. *Supra*, pp. 3-4. It is thus apparent that Section 202, as originally enacted in 1941, permitted acquisition of existing public works. For if Congress had not previously authorized condemnation of public works in Section 202, the proposed prohibition against acquisition would have been unnecessary, as also would have been the modification of it which became law. And if Section 202, as passed in 1941, did not authorize the taking of land devoted to the uses of an existing public utility, the 1943 amendment's exception from its prohibitory provisions of in-

stances where the owners consented to the taking would be fruitless; no authority to take would exist even in such a case.[5]

II

The Provision of the Act of July 15, 1943, Conditioning Acquisition of Existing Public Works Upon Consent of the Owners, Is Complied With When the Legal Owner Files an Answer in Condemnation Making No Objection to the Proceeding

While the court of appeals expressly declined to put its decision upon the Act of July 15, 1943, 57 Stat. 565 (*supra*, pp. 3-4), on the basis of which the condemnation proceeding had been dismissed by the district court (R. 36-41; *supra*, p. 7), it made plain that it agreed with the trial court on this point (R. 48-49). Accordingly, we shall undertake to show here that the condition imposed by the 1943 Act was met.

1. The 1943 Act forbade, in effect, the acquisition of "public works already operated by public

---

[5] The 1943 statement of Senator Taft, quoted below (R. 47-48), seems to us to go no further than to agree with the First Circuit that the Lanham Act did not authorize the taking of a complete electric utility system, including its personal as well as its real property. If, however, the Senator meant, as the Fourth Circuit thought, that no land used by an existing utility could be condemned under the Lanham Act, his 1943 views were contrary to the words of the 1941 Act, as well as to the 1942 *Puerto Rico* opinion of the First Circuit. Subsequent legislative history of this type cannot "supplement the contemporaneous intent of the Congress which enacted" the Lanham Act. *Fogarty* v. *United States*, 340 U.S. 8, 13-14.

or private agencies", except "with the consent of the owners thereof." Whatever may be the meaning of "owners", as it is used in this Act, it certainly comprehends the Belle Haven Realty Corporation. That Corporation consented unconditionally to the acquisition by filing on December 14, 1950, an answer in which—raising no objections to the maintenance of the proceedings[6]—it asked as just compensation for the taking the reproduction cost of the system less depreciation. *Supra*, p. 6; R. 33-34.

Nonetheless, the court of appeals agreed with the trial court that the Corporation's consent did not comply with the statute because it "was given upon a condition which the Government is unwilling to accept" (R. 49). This conclusion was based solely on the last paragraph of the Corporation's answer, stating in effect that in 1943 the Corporation had agreed to accept nominal compensation on condition that the final judgment in the condemnation proceedings should provide that no charges would be imposed on owners of lots in the Belle Haven subdivision for the cost of operating and maintaining the sewer system. *Supra*, fn. 1, pp. 6-7. This is merely an allegation that an attempt had been made to agree amicably upon the amount and form of compensation for the taking, and not that the owner had imposed an unfulfilled condition prece-

[6] Unlike the intervenors, the Corporation did not ask that the condemnation proceedings be dismissed.

dent to the Government's acquisition of the property. The Corporation's answer (R. 33-34) makes it quite clear that the allegations concerning the earlier conditional agreement to accept nominal compensation were included solely in order to explain the Corporation's refusal, in 1950, to accept nominal damages and its demand, at that time, for full reproduction cost less depreciation. Consequently, there is nothing which qualifies the Corporation's consent to the condemnation. All that has happened is that the Corporation has withdrawn its earlier agreement to accept nominal damages and now asks for substantial monetary compensation.[7]

2. The court of appeals also agreed with the trial court's further holding that the 1943 Act required the consent of everyone who was served by the system and hence that, since some of the lot owners objected to the Government's acquisition, the condemnation proceeding had to be dismissed. A brief consideration of the results of this interpretation of the 1943 Act demonstrates the error of the courts below.

The 1943 Act applied to all acquisitions whether voluntary or by condemnation. Under the construction placed upon it by the lower courts, the

---

[7] This case is here on the pleadings; there has been no trial. If the Corporation's answer leaves any doubt as to the quality of its consent to condemnation, a trial on this issue will demonstrate that the consent was complete and unqualified.

Corporation could not even have *sold* the system to the United States unless all the lot owners agreed. On that view, the statute would have divested the Corporation of the powers of management and control ordinarily inherent in ownership. Such a construction is obviously unacceptable and should not be adopted unless there is no alternative. Here, there is the wholly acceptable alternative of reading the word "owners" in its ordinary sense of proprietor of the property and holder of fee title.

Furthermore, it is evident that such a construction would make practically impossible the acquisition of existing public works. By the Lanham Act, Congress had authorized the acquisition of works like the sewerage system here involved where that could be accomplished by acquisition of lands or interests in lands. *Supra*, pp. 3, 11-16. However, by the 1943 Amendment it declared that where such a public work was already operated by a public or private agency it could be acquired only with the consent of the owner. It limited the authority to acquire by granting the owner arbitrary power to prevent the acquisition. Of course, Congress knew that there would be many users of such public works, and it was apparent that it would be virtually impossible to secure their unanimous consent. Thus, a Congressional definition of "owners" which would require the consent of every user would have been tantamount to

a prohibition against acquisition. Yet, as the proceedings in the Senate show (*supra*, pp. 16-17; R. 47-48), the 1943 Act did not prohibit, but merely limited, acquisition. And the very example used by Senator Taft, in proposing the 1943 modification, shows that a railroad could be acquired if the railroad company was willing; consent of shippers or passengers was not mentioned by the Senator and was obviously thought to be unnecessary. It follows that a construction which in effect converts the limitation of the Act into a prohibition, by requiring the consent of each of the many users, is a misconstruction of the statute and goes beyond the legislative purpose.

It does not make any difference that the Corporation added the cost of installing the sewer system proratably to the purchase price of the individual lots in the subdivision (R. 11) or that these lot owners may have an implied easement of some kind in the sewer system (R. 18-20). It is common for users of utility services to pay the capital costs of the utility by way of special assessments or as part of the fees charged by the utility for the service. Such payments do not make the users the legal owners of the utility property; the utility company or the municipality retains the legal title and controls and manages the utility's affairs. The customers may obtain a legal right to continued service but they are not "owners". It may even be, as the district court

held, that such payments give the lot owners an "implied easement" "in and to" the sewer system (R. 25), but persons with easements in and rights to use a piece of property cannot be deemed its "owners", either in the conventional sense or as that term is employed in the 1943 Act. Their easement, as the district court's first opinion shows (R. 18-20), is little more than a right to continue to use the sewer system. If this right has been invaded or limited by the Government's taking, the lot owners may possibly be entitled to just compensation. But they are not transformed into the system's "owners". They may own an easement in the land and the sewers, but they do not own the land or the sewers themselves.[8]

III

No Other Issues Are Properly Before This Court

In the court of appeals and in their brief in opposition (pp. 2, 4-5, 9, 10-11, 12), respondents have sought to raise certain other issues which we believe are not ripe for judicial determination. In anticipation that these issues will again be raised and because the court of appeals seemed to incline

---

[8] It is significant that the Restatement of Property, in the introductory note to its restatement of easements, distinguishes between one who has a privilege of use for a special purpose (*i.e.*, an easement) and "the owner of the land used". A.L.I. *Restatement of Property*, Vol. V ("Servitudes"), Part I ("Easements"), "Introductory Note", pp. 2897-8; see also, to the same effect, Sec. 450, Comment f., p. 2905.

favorably toward some (R. 48-49), we deal with them here.

1. The most important thing to be said about these additional issues is that most, if not all, depend upon respondents' version of the facts, and there has been no trial or contest of facts. Thus far, only legal issues have been mooted and decided. The district court rested its judgment of dismissal on its view of the legal requirements of the 1943 Act. The court of appeals affirmed on its view of the authority granted by the Lanham Act, as amended in 1941, with respect to lands used for existing public works. And the trial court has not found, or even been asked to hear and decide, any of the factual issues to which respondent refers.[9] There has not even been a motion for summary judgment. Accordingly, there is clearly no place, at this stage of the proceedings, for the contentions that (a) the Belle Haven sewer system was acquired for the sole purpose of turning it over to Fairfax County for a non-federal use (see R. 31; Br. in Opp., pp. 4-5); (b) the taking was wholly unnecessary (see Br. in Opp.,

[9] With the possible exception of the Corporation's allegations in its answer that it agreed with the Government, in 1943, to accept nominal damages if the lot owners were freed from all charges. The court of appeals declared that the district court made such a finding on the basis of pre-trial conferences (R. 45). In our discussion in Point II, *supra*, pp. 17-22, we have assumed the Corporation's allegations as facts.

to defray the costs of maintenance and operation of their sewer system: that is, that the [illegible]e protected from being required to pay any part of the amortization of the cost of the trunk line or other part of the sewer system. The Government's motion to strike out this prayer raised the question of whether or not this court could, over its protest, impose such a limitation on the Government's taking.

Inasmuch as the Belle Haven householders had a sewer system ample for their needs, which they had paid for as part of the purchase prices of their lots, the contention of the intervenors did not seem to me unreasonable. However, I came to the conclusion that, without its consent, under the law I was powerless to impose any such limitation or condition on the Government's taking. This opinion is reported as *United States* v. *Certain Parcels of Land in Fairfax County, Virginia, et al.* (*Davis, Intervenor, et al.*), 89 F. Supp. 571.

The intervenors, being allowed to amend their answers, have filed answers * * * directly attacking the authority of the Government to acquire their sewer system by condemnation and praying that the Government be required to restore their sewer system to the condition in which it was before the Government's taking." (R. 16-17)

The property owners contended that the original Lanham Act (the basic authority relied on by the Government for the taking) did not authorize condemnation of an existing utility; and that furthermore such a taking was affirmatively forbidden by the 1943 amendment to the Act. The District Court set aside the taking on the second ground (R. 19), without passing upon the first (R. 17). The Court of Appeals affirmed on both grounds,[4] stating:

"That is was not the intention of Congress to authorize the acquisition of existing public works systems

[4] The petition here erroneously states that "Although the Court of Appeals below expressed approval of the trial court's construction of the July 15, 1943, amendment to the Lanham Act it declined to make this provision a basis for its judgment * * *." (p. 10, n. 5.)

under the Lanham Act was not only decided, and we think correctly so, in *Puerto Rico Ry. Light & Power Co.* v. *United States, supra*, but was also expressed subsequent to that decision by Congress itself in the act of 1943 increasing the appropriation for the acquisition of property under the Lanham Act." (R. 39).

ARGUMENT

The petition here is based on two grounds: first, an extraordinary attempt to interpret the ground for decision below as being that property already devoted to a public use can be condemned, even by the sovereign, only under a statute which expresly or by necessary implication authorized the taking of such property (Petition, Reasons for Granting the Writ 1, 3, and 4); and, second, a contention that the decision below is in conflict with that of the Court of Appeals for the First Circuit in *Puerto Rico Ry. Light & Power Co.* v. *United States*, 131 F. 2d 491 (id., Reason 2). We submit that the first ground is based on a plain distortion of the opinion below; and that the decision in the First Circuit is squarely in accord with the decision below.

I.

The Dictum in Question Was Wholly Immaterial to the Decision Below

Petitioner's first point is based on the following passage in the opinion below:

> "A sewer system is a system of drainage pipes, not lands or interests in lands. Easements in land are essential to the maintenance of such a system; but the power to condemn easements in order that a system may be constructed does not carry with it the power to condemn an existing system. *Puerto Rico Ry. Light & Power Co.* v. *United States*, 1 Cir., 131 F. 2d 491, 499. Counsel for the government asserts the contrary, but they cite no authority to sustain their position, and we know of none. The rule is well settled that a general power of condemnation does not authorize the condem-

nation of property already legally appropriated to a public or quasi public use, in the absence of legislative authority expressly given or necessarily implied. 18 Am. Jur. 723-724; 29 C. J. S. 866; 10 R. C. L. 198-199; note 173 A. L. R. 1379; *Alexandria & F. R. Co.* v. *Alexandria & W. R. Co.*, 75 Va. 780, 40 Am. Rep. 743; *Vermont Hydro-Electric Corp.* v. *Dunn*, 95 Vt. 144, 112 A. 223, 12 A. L. R. 1495; *Old Colony R. Co.* v. *Framingham Water Co.*, 153 Mass. 561, 27 N. E. 662; 13 L. R. A. 332. A fortiori a general power to condemn lands may not be construed to authorize the condemnation of a public works system merely because easements in land are appurtenant thereto. This would seem to be elementary." (R. 38-39).

Apparently the court's statement as to the rule of construction with respect to property already devoted to a public use overlooks the distinction mentioned by this court, in *United States* v. *Carmack*, 329 U. S. 230, 243, fn. 13, as between takings by public utilities and by the sovereign. But—in the context of the entire opinion, and the entire situation here—what possible difference does it make? In the first place, the statement in question was made merely as a premise for an "a fortiori" conclusion which must, we think, be indisputable, namely that

> "* * * a general power to condemn lands may not be construed to authorize the condemnation of a public works system merely because easements in land are appurtenant thereto." (R. 39).

As Chief Judge Parker says, "this would seem to be elementary" (R. 39), although it fairly summarizes the Government's attempt to bring this taking within an act which authorized condemnation only of "improved or unimproved lands or interests in lands" (Lanham Act, sec. 202(a), *supra* at p. 3). But, in any event, no rules of construction need be resorted to in order to conclude—as has the court below, and the Court of Appeals for the First Circuit—that the Lanham Act did not authorize the condemnation of existing utilities.

The Original Lanham Act.

The legislative history of the Act, which is discussed in the opinion in the First Circuit,[5] shows that the purpose of this defense statute was to provide public services in areas congested by the defense effort, where no such services, or inadequate ones, existed. Pursuant to this purpose, it is clear on the face of the Act that the Government's authority under it is limited, as far as condemnation is concerned, to the taking of land upon which to construct public works. The only power granted with respect to the acquisition of existing public works is that in section 202(b) to "lease public works" (see p. 3, *supra*).

Moreover, even if the power of condemnation had been extended to existing facilities, it would have been restricted, under the Act, to facilities which had to be acquired in order to carry out the purposes of the Act, namely, to provide a necessary service to some locality where there was "an acute shortage of public works or equipment for public works necessary to the health, safety, or welfare of persons engaged in national-defense activities * * *" (sec. 202, first paragraph). There was no shortage of sewer facilities in the Belle Haven subdivision itself (R. 16); and since the Belle Haven system is on a hill which would not have permitted flowage from the trunk (gravity) system, its taking was not only unnecessary to, but not even usable for the construction or operation of the trunk system (R. 28).

The 1943 Amendment.

If there could otherwise be any doubt as to the intent of the original Lanham Act, it would have been set at rest by an authoritative expression from Congress itself at the time of the 1943 amendment to the Act. The District Court rested its decision on this ground alone.

---

[5] *Puerto Rico Ry. Light & Power Co.* v. *United States*, *supra*, 131 F. 2d 491, 495.

The amendment in question was to the appropriation provision of the Act, and provided as follows:

> "* * * Provided further, That (a) none of the funds authorized herein shall be used to acquire public works already operated by public or private agencies, except where funds are allotted for substantial additions or improvements to such public works and with the consent of the owners thereof, * * *." (Act of July 15, 1943, 57 Stat. 565, as amended July 3, 1945, 59 Stat. 383, 42 U. S. C. A. sec. 1534, note.)

As indicated by its legislative history the basic prohibition contained in this proviso was purely declaratory of the intent of Congress with respect to the original Lanham Act, while the excepting clause was intended to open the door to acquisition of existing public works in a few isolated cases where everybody concerned might consent. The relevant legislative history is set forth in the opinion below (R. 39-41). The attention of the court is particularly invited to Senator Taft's statement, with respect to the acquisition of existing public works, that

> "* * * certainly there was nothing in the Lanham Act which authorized any such proceeding. *It was intended to provide new facilities, it was not intended to provide for taking over old facilities.* I think it is perfectly clear that no such power should be included in the Act." (R. 40) (Emphasis supplied)

It is also important to note that Senator Taft's statement was expressly concurred in by Senator Maloney, who was in charge of the pending bill in 1943 and who had been chairman of the committee which reported out the original Lanham Act. (Cong. Rec., July 6, 1943, p. 7287)

For the reasons indicated by both courts below, the conditions attached to the operation of the excepting clause in the amendment were not satisfied. There was no allotment of funds for additions or improvements to the Belle Haven sewer system—there were no additions or improvements of